# The Supposed Doctrine of Mistake in Contract: A Comedy of Errors

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*Rose* v. *Pim*,[1] from the number and importance of the points it raises and the treatment of those points by Denning L.J., furnishes material fitter for a book on the English law of simple contract than an article for this journal. The case is particularly important when read as a part of the continuing judicial interpretation of the doctrine of operative mistake in contract since the decision of the House of Lords in *Bell* v. *Lever Bros. Ltd.*[2] It is now clear, from the important joint judgment of Dixon J. (as he then was) and Fullagar J. in *McRae* v. *Commonwealth Disposals Commissioner*,[3] and from a series of recent decisions by the Court of Appeal, particularly as expressed in strong and consistent judgments delivered by Denning L.J.,[4] that dicta in *Bell* v. *Lever Bros. Ltd.* mark, not the authoritative recognition in English law of the civilian doctrine of mistake as nullifying consent, but the first steps in its replacement by native English theory.[5]

Having regard both to the judicial reasoning in the cases and also to the results which would necessarily have ensued from the

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[1] [1953] 2 Q.B. 450; [1953] 2 All E.R. 739.

[2] [1932] A.C. 161.

[3] (1951), 84 C.L.R. 377.

[4] Particularly in *Leaf* v. *International Galleries*, [1950] 2 K.B. 86, *Solle* v. *Butcher*, [1950] 1 K.B. 671, and *Rose* v. *Pim*, *supra*, footnote 1. In the last case Denning L.J.'s judgment contains a reasoned and authoritative exposition of English legal principle and it is obvious that his lordship has derived much support from *McRae*'s case for the position taken in his earlier judgments.

[5] The judgment of Lord Atkin in *Bell* v. *Lever Bros. Ltd.* itself contains two theories of operative mistake: (a) that mistake operates, if at all, to nullify consent, and (b) that common mistake operates to make the contract void if the truth of the common assumption of the parties can be implied into the contract as a condition precedent to their obligation. By laying down that in either case the mistake must go to the *existence* of the subject matter, he excluded operative mistake from the contract in question on either principle. *Infra*, pp. 183-184.

application of the civilian doctrine of mistake, it is submitted that the decisions in *Leaf* v. *International Galleries*,[6] *Solle* v. *Butcher*,[7] *McRae* v. *Commonwealth Disposals Commissioner*[8] and *Rose* v. *Pim*[9] must definitely be accepted as depriving many of the dicta in *Bell* v. *Lever Bros. Ltd.*[10] of the great authority usually attached to pronouncements of the august court which decided it. As Denning L. J. pointed out in *Rose* v. *Pim*, "counsel for the sellers quoted *Bell* v. *Lever Bros. Ltd.*, and suggested that the contract was a nullity and void from the beginning *though he shuddered at the thought of the consequences of so holding*".[11]

Having regard to modern authority, it appears that the question to what extent mistake, whether the mistake of one party or of both parties, has *in itself* any operative effect upon an alleged contract can only be approached in light of other well-established rules which may operate to free one or both parties from a contractual obligation at any point of time from its alleged inception in offer and acceptance to discharge by breach or by subsequent impossibility of performance.

This article, therefore, will deal with the matter under the following heads:

I. The points emerging from the judgments in *Rose* v. *Pim*.

II. What is the practical importance of the question whether mistake in itself affects the contractual obligation independently of other well-established principles?

III. What are the principles which operate independently of mistake to free one or both parties from an alleged contract?

IV. In what circumstances, *if at all*, does mistake affect a contract independently of those principles?

## I. *The Issues Raised in Rose* v. *Pim*[12]

To summarize the essential facts in the case, the plaintiffs were London buyers with business associates in Egypt to whom, from time to time, they resold their merchandise. The defendants were London sellers with business associates in North Africa from whom they obtained merchandise for re-sale. The plaintiffs received from their associate Egyptian company an inquiry for "five hundred Moroccan horsebeans described here [that is, in Egypt] as 'féveroles'". Being ignorant of the meaning of the French word

[6] [1950] 2 K.B. 86.
[7] [1950] 1 K.B. 671.
[8] (1951), 84 C.L.R. 377.
[9] [1953] 2 Q.B. 450.
[10] [1932] A.C. 161.
[11] [1953] 2 Q.B. 450, at p. 459.
[12] [1953] 2 Q.B. 450.

"féveroles", Rose's representative sought enlightenment from a representative of Pim & Co., the defendants, whom he regarded as a convenient informant, having regard both to long mutual association and the defendants' North African connections. His informant, although ignorant of the true meaning of the term or of its meaning in Egypt, told him, apparently without making proper inquiries, that it "just meant 'horsebeans'". In actual fact there were three varieties of North African horsebeans, small, medium and large. Although even at the last, and even in the learned lords justices' minds, there seems to have been some uncertainty as to the exact primary meaning of the French word "féveroles", it was found as a fact that the word, as used in Egypt, denoted exclusively the medium variety of horsebean. It was admitted from first to last that the Egyptian inquiry was about the medium variety and that the Egyptian buyers wanted only this kind. The result of the conversation between the plaintiff's representative and the defendants' representative was that, from the time of the preliminary conversation onwards, both parties were under a common mistake as to what "féveroles" were. Both parties believed them to be f. a. q. North African horsebeans of any variety, whereas actually they were a special variety of medium size. After further negotiations, *three*[13] written contracts were signed:

(1) a contract between Pim and an Algerian company for the purchase of 500 tons of Tunisian horsebeans at £32 a ton less 1¼%;

(2) a contract between Rose and Pim in which Pim resold to Rose the 500 tons of Tunisian horsebeans at £32 a ton; and

(3) a contract between Rose and an Egyptian buyer for the sale of the 500 tons of Tunisian horsebeans at £33 a ton.

In the last contract the Egyptian buyer and Rose were, of course, under the same common mistake as to the meaning of the words "horsebeans" and "féveroles", since the Egyptian buyers took it for granted that the English word "horsebeans" was a translation of the French word "féveroles" as the word was understood in Egypt.

When the Egyptian buyer took delivery of the goods, the mis-

[13] Actually *six* contracts came into existence, two between Pim and his North African suppliers, two between Rose and Pim, and two between Rose and his Egyptian purchasers. As the same principles apply to each group of contracts, the account is simplified. The mistake became known, and the litigation arose from the delivery of horsebeans to an Egyptian buyer under one series of contracts which had involved Rose in liability in the Egyptian courts. The remedy sought in the English courts was an attempt by the plaintiff to protect himself against further liability.

take was discovered. He found that they were horsebeans and not *féveroles*, but as he had already paid for the goods by means of an irrevocable credit, he did not reject them but accepted them and claimed damages. As Rose had already been held liable in the Egyptian courts to another Egyptian buyer on a similar contract for the sale of a parcel of 200 tons, he sought to protect himself by a claim against Pim. This he tried to do by bringing an action for the rectification of the contract between himself and Pim by the addition of the word "féveroles". If this claim had succeeded, Pim would have been clearly liable to Rose for a breach of the second contract, as rectified. The defence was either that the true contract between the parties was for horsebeans and the written instrument could not be rectified or that there was no contract at all.

The trial judge upheld the plaintiff's claim on the ground that both the plaintiff and the defendant made an oral agreement in which they intended to deal in "horsebeans of the féverole type". The three lords justices of appeal agreed in accepting the defendants' argument that the parties contracted with reference to horsebeans *simpliciter*, and not with reference to a special type of horsebeans, although they were under a common mistake as to the nature of horsebeans. Hence the written contract represented the true agreement of the parties and could not be rectified.

From their lordships' judgments the following points emerge:

(a) Rose was induced to enter into the contract by the innocent misrepresentation of Pim's agent as to the meaning of the word "féveroles", but the right to rescind was not exercised[14] and, as between the plaintiff and the defendant, was lost when the plaintiff and his sub-buyer failed to act in time and "accepted the goods and treated themselves as the owners of them".[15]

(b) Denning L.J. expressed the view *obiter* that, although the right to rescind for innocent misrepresentation had been lost when the plaintiff and his sub-buyers "accepted the goods and treated themselves as the owners of them", the mere fact that the contract was executed would not be a bar to rescission, and that they might have rejected the goods and asked for their money back as soon as the mistake was discovered.[16] This dictum, repeating the view expressed by the learned lord justice in *Solle* v. *Butcher*,[17] must therefore be added to the weight of judicial opinion against the rule

[14] *Per* Singleton L.J. at p. 457. [15] *Per* Denning L.J. at p. 461.
[16] At p. 461.
[17] [1950] 1 K.B. 671, at pp. 695-696.

in *Angel* v. *Jay*,[18] to the effect that the equitable right to rescind for innocent misrepresentation can only be exercised while the contract is wholly executory.[19]

(c) Both Singleton L.J. and Denning L.J. were of opinion that the plaintiffs might have succeeded in a claim for damages for breach of a "collateral warranty"—a warranty that "the horse-beans would be a compliance with a demand for 'féveroles' ".[20] It is submitted that by a warranty their lordships clearly had in mind a warranty *ex post facto*, that is, a condition which has sunk to the level of a warranty because the party entitled to repudiate for breach of the condition fails to exercise his right in due time.

(d) In discussing the possibility of a claim for damages for breach of a "collateral warranty" Denning L.J. was of opinion that such a warranty would have been in no way in contradiction of the written contract.[21] The writer suggests that, while this view is in accordance both with authority and the requirements of good sense, it is a further illustration of the unreality of the supposed general rule that parol evidence cannot be admitted to add to, vary or contradict a written instrument.[22]

(e) The case illustrates the true rational basis of the English law of simple contract, namely, the enforcement of a bargain between the parties, in which the law is concerned primarily with affixing legal consequences to the parties' actions. But since the law is concerned with the actions of rational beings, it is necessarily concerned also with the analysis of their intentions, and the law only attributes to them an intention other than their true intention in exceptional cases, when either their outward behaviour

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[18] [1911] 1 K.B. 666.

[19] On the other hand, recent judicial support of the rule in *Angel* v. *Jay*, [1911] 1 K.B. 666, is to be found in the judgment of Jenkins L.J. in *Solle* v. *Butcher*, [1950] 1 K.B. 671, at p. 703. Sir Raymond Evershed M.R. expressly withheld his opinion on this point in *Leaf* v. *International Galleries*, [1950] 2 K.B. 86, at p. 93.

[20] *Per* Singleton L.J. at p. 457; *per* Denning L.J. at pp. 462-463. Denning L.J.'s opinion on this point appears to be stronger than Singleton L.J.'s opinion. Denning L.J. said, however, that "the only difficulty might be whether it was a contractual warranty or merely an innocent misrepresentation". Thus counsel for the plaintiffs, by abandoning at the trial the claim for damages, may have committed a curious error, and, by asking for rectification, may have chosen a circuitous and unsuccessful road to what was already and immediately available to them.

[21] [1953] 2 Q.B. 450, at p. 462.

[22] To the writer, the distinction drawn in the cases between the express written contract and "collateral contracts" is theoretically meaningless, whatever its practical advantages in excluding the general rule.

or the consequences of their conduct so require.[23] It is submitted that the remarks of Denning L.J. afford no support for the statement of Dr. Glanville Williams when he says that they are "probably the most forcible expression of the 'objective' theory of contract that have yet fallen from an English judge".[24] His lordship, discussing the scope of the remedy of rectification, observed that, "In order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract".[25] There appears to be no good reason for interpreting this statement to mean that, because English law does not look into the inner minds of the parties, it does not, as a general rule, do its utmost to ascertain their true intentions. In *Rose* v. *Pim* the court went to extreme lengths to determine the true intentions of the parties, by looking not only at their negotiations *inter se*, but also at the dealings of each party with his business agent before the parties came into negotiations with each other and, further, by taking into consideration the behaviour of the parties with respect to the cargo superintendent's certificate when the goods were shipped after the contract had been concluded. A true objective theory of contract is one which affixes the consequences of agreement to the acts of the parties irrespective of intention, and this is not the policy of English law, except in exceptional cases where justice or practical convenience so demand.[26] But, in contradistinction to the continental theory of contract, the English theory affixes consequences to the parties' acts and is concerned with intention as an integral element in human action. And it is submitted that the case illustrates in this respect principles and a policy long established in the common law.

(f) Although the decision in the case turns on the applicability of the equitable remedy of rectification to the parties' written contract, the case, read in conjunction with *Solle* v. *Butcher*[27] and *McRae* v. *Commonwealth Disposals Commissioner*,[28] demonstrates conclusively that there is no general rule of English law that a fundamental common mistake makes the contract void. On this point Denning L.J. expressed himself as follows:[29]

[23] See K. O. Shatwell, The Doctrine of Consideration in the Modern Law (1955), 1 Sydney Law Review 288.

[24] See Glanville Williams, Mistake and Rectification in Contract (1954), 17 Mod. L. Rev. 154.

[25] [1953] 2 Q.B. 450, at p. 461.

[26] *E.g.*, acceptance by post and the "ticket" cases.

[27] [1950] 1 K.B. 671.

[28] (1951), 84 C.L.R. 377.

[29] [1953] 2 Q.B. 450, at p. 459.

> What is the effect in law of this common mistake on the contract between the buyers and the sellers? Counsel for the sellers quoted *Bell* v. *Lever Bros. Ltd.*[30] and suggested that the contract was a nullity and void from the beginning, though he shuddered at the thought of the consequences of so holding. I am of the opinion that the contract was not a nullity. It is true that both parties were under a mistake and that the mistake was of fundamental character with regard to the subject-matter. The goods contracted for — horsebeans — were essentially different from what they were believed to be — 'féveroles'. Nevertheless, the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning, though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity.

His lordship, after citing *Ryder* v. *Woodley*,[31] *Harrison & Jones* v. *Bunton & Lancaster*[32] and *McRae* v. *Commonwealth Disposals Commission*,[33] said of the last case that "the High Court of Australia held that the mistake, although fundamental, did not make the contract a nullity, and that the buyers were entitled to damages. The court showed convincingly that *Couturier* v. *Hastie*[34] was a case of construction only. It was not a case where the contract was void for mistake. The other old cases at common law can likewise be explained." His lordship then concluded by saying:

> At the present day, since the fusion of law and equity, the position appears to be that, when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground: See *Solle* v. *Butcher*.[35]

The case therefore, taken in conjunction with the recent cases previously cited,[36] raises the important question of the effect, if any, of operative mistake upon a contract and its relation to the other rules which may free one or both parties to a contract from

[30] [1932] A.C. 161.
[31] (1862), 10 W.R. 294; 17 Digest 45, *504*.
[32] [1953] 1 Q.B. 646; [1953] 1 All E.R. 903.
[33] (1951), 84 C.L.R. 377.
[34] (1856), 5 H.L. Cas. 673; 25 L.J. Ex. 253; 10 E.R. 1065.
[35] [1950] 1 K.B. 671.
[36] *Leaf* v. *International Galleries*, [1950] 2 K.B. 86; *Solle* v. *Butcher*, *supra*, footnote 35; *McRae* v. *Commonwealth Disposals Commissioner* (1951), 84 C.L.R. 377.

the contractual obligation at any time from its inception in offer and acceptance to its discharge by breach or by frustration.

## II. *The Practical Importance of whether Mistake in Itself Affects the Contractural Obligation*

What is the practical importance of the question whether mistake in itself operates independently of other principles? The answer to this question is of fundamental importance for two reasons.

(1) Authority is to be found, both in the textbooks[37] and in the cases, for the proposition that fundamental mistake may operate to make the contract a nullity and *void ab initio* at common law by destroying the consent upon which a contract depends for its inception and for its existence. The supposed principle, if it exists, is undoubtedly based on importations of civilian doctrine from Pothier.[38] The theoretical objections to which it is open would not avail against the requirements of practical convenience, but the cases show conclusively that the application of any such principle, at least in the form of an absolute rule, produces entirely unacceptable results for the following reasons.

(a) If the contract is void *ab initio* at common law, property cannot pass under it and hence, if goods are transferred under such a contract to third persons, they acquire no title and the goods can be recovered back.[39] The position of innocent purchasers cannot be accepted as satisfactory either in the *Cundy* v. *Lindsay*[40] situation or the "non est factum" group of cases. It is contrary to the general policy of the common law that where loss must necessarily fall on one of two innocent parties it is thrown upon the person whose conduct has put in motion the train of events from which it results. It must also be borne in mind that in the classical Roman law, from which the civilian principle was distilled, contract and transfer were distinct and independent legal categories, property did not pass under a contract of sale, and hence the rights of innocent third parties could not be prejudiced.

(b) If a contract is void *ab initio* at common law, *neither* party can complain of breach and neither party can have any remedy

[37] Particularly, Anson on Contract, even in the 20th ed.

[38] Whether properly understood or not is immaterial. See Pollock on Contracts (13th ed.) p. 402, n. 95; Denning L.J. in *Solle* v. *Butcher*, at pp. 691-692; *McRae* v. *Commonwealth Disposals Commissioner*, at p. 407; and *Sowler* v. *Potter*, [1940] 1 K.B. 271, at pp. 273-274.

[39] Compare *Cundy* v. *Lindsay* (1876), 1 Q.B. 348; (1878), 3 App. Cas. 459, with *Phillips* v. *Brooks*, [1919] 2 K.B. 243.

[40] (1876), 1 Q.B. 348; (1878), 3 App. Cas. 459.

in damages. A palpable injustice and an absurdity would have resulted from the application of the supposed principle to the facts in *McRae*'s case,[41] and in discussing *Couturier* v. *Hastie*[42] their honours expressed the opinion that the purchaser would have had a remedy in damages.[43] In *Leaf* v. *International Galleries*[44] the court was clearly of opinion that the purchaser had a claim for damages for breach of warranty.[45] In *Rose* v. *Pim*, Singleton L.J. and Denning L.J. took a similar view of the purchaser's rights[46] and this consideration no doubt explains Denning L.J.'s remark that "Counsel for the sellers . . . suggested that the contract was a nullity and void from the beginning, though he shuddered at the consequences of so holding".[47] Similarly the writer suggests that in the kind of unilateral mistake illustrated by *Smith* v. *Hughes*[48] it is absurd to suggest that the contract was void *ab initio* and that the defendant, who sought merely to escape liability, would have had no remedy in damages.

(2) *Solle* v. *Butcher*[49] affords authority for the view that equity may give relief for mistake by rescinding a contract on fair and just terms at the suit of a party who is not entitled to a remedy at common law whether for mistake as such *or on any other ground*.[50] The equitable rules in respect of contract operate in three ways: (i) since equitable remedies are discretionary, the court may refuse specific performance in cases of exceptional hardship, although the contract is perfectly good at common law, the plaintiff being left to his action for damages;[51] (ii) the contract may be void or

[41] *McRae* v. *Commonwealth Disposals Commissioner* (1951), 84 C.L.R. 377.

[42] (1856), 5 H.L. Cas. 673; 25 L.J. Ex. 253; 10 E.R. 1065.

[43] Their Honours say (1951), 84 C.L.R. 377, at p. 406: "The truth is that the question whether the contract was void, or the vendor excused from performance by reason of the non-existence of the supposed subject matter, did not arise in *Couturier* v. *Hastie* (1852), 8 Ex. 40 [155 E.R. 1250]; (1853), 9 Ex. 102 [156 E.R. 43]; (1856), 5 H.L.C. 673 [10 E.R. 1065]. It would have arisen if the purchaser had suffered loss through non-delivery of the corn and had sued the vendor for damages. If it had so arisen, we think that the real question would have been whether the contract was subject to an implied condition precedent that the goods were in existence."

[44] [1950] 2 K.B. 86.

[45] *Per* Denning L.J. at pp. 89-90; *per* Jenkins L.J. at p. 92; *per* Sir Raymond Evershed M.R. at p. 95. Sir Raymond is more guarded on the point than his learned brothers. The writer suggests that as in *Rose* v. *Pim*, [1953] 2 All E.R. 739, it was a warranty *ex post facto*. See Denning L.J. at p. 89.

[46] [1953] 2 Q.B. 450, *per* Singleton L.J. at p. 457; *per* Denning L.J. at pp. 462-463.

[47] [1953] 2 Q.B. 450, at p. 459.

[48] (1871), L.R. 6 Q.B. 597; 40 L.J.Q.B. 221.

[49] [1950] 1 K.B. 671.

[50] See particularly the judgment of Denning L.J. at pp. 692 *et seq.*

[51] The authorities establish that equity will refuse specific performance

voidable at common law, but the limited nature of the remedies at common law forces the plaintiff to seek rescission or other relief in equity;[52] (iii) the court of equity may grant equitable relief on purely equitable grounds, an obvious example in contract being equitable fraud.

In New South Wales, where common law and equity are administered in separate jurisdictions, the precise relation of the common-law rules to the equitable rules is important in a way which does not apply in England or in Australian states which have adopted a Judicature Act system. In the latter jurisdictions it is only important if a plaintiff in an action either persists in asking for the wrong remedy or invokes the aid of equity where he has no remedy at law. In New South Wales, however, the separation of the jurisdiction compels a court to define the common-law principles in an action at common law with a precision not required when the court can give relief either on common law or on equitable principles. In *Solle* v. *Butcher* Denning L.J. expresses the view that before the Judicature Act the common law was strained to give relief for the effects of mistake in a way no longer necessary since the fusion of the administration of law and equity,[53] and he impliedly assumes that there is a jurisdiction to relieve for mistake on equitable grounds in cases where a party is not entitled to a relief at law on any ground. On the other hand, an argument can be raised from *British Movietone News* v. *London Cinemas*[54] that equity has jurisdiction to rescind a contract, valid and bind-

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on the ground of exceptional hardship where the defendant is under a mistake affording no grounds for rescission either at law or in equity.

[52] In a contract voidable at common law for fraud or breach of a condition the victim can repudiate in the sense that he has a good defence if sued, and he can recover money paid under such a contract.

[53] [1950] 1 K.B. 671, at p. 691, where his lordship says: "Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts of common law, in order to do justice in the case in hand, extended this doctrine of mistake beyond its proper limits and held contracts to be void which were really only voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract. In the well-known case of *Cundy* v. *Lindsay* (1876), 1 Q.B.D. 348; (1878), 3 App. Cas. 459, Cundy suffered such an injustice. He bought the handkerchiefs from the rogue, Blenkarn, before the Judicature Acts came into operation. Since the fusion of law and equity, there is no reason to continue this process, and it will be found that only those contracts are held void in which the mistake was such as to prevent the formation of any contract at all."

[54] [1952] A.C. 166. For a discussion of this case see C.J. Slade, The Myth of Mistake, in (1954), 70 L.Q. Rev. 389. This article was not available to the writer before the completion of this article.

ing at common law, only on the grounds of innocent misrepresentation or equitable fraud.

### III. *Principles Operating Independently of Mistake to Free One or Both Parties from an Alleged Contract*

The principles are these:

(1) A man cannot accept an offer which he knows is not intended for him.[55]

(2) Offer and acceptance must substantially correspond in terms, otherwise no contract comes into existence. This must be taken subject to the general principle that an offeror is bound by the sense which the other party would reasonably put upon his conduct and, conversely, the acceptor is bound by the sense in which the offeror would reasonably interpret his conduct.

(3) At common law a contract into which one party is induced to enter by a fraudulent misrepresentation is voidable at his option. He has an action in tort for deceit and he can abstain from performance, and, if sued for damages for breach, he can plead fraud as a defence provided he has not affirmed the contract. If, however, he wishes to take active steps to free himself from the voidable obligation he must seek the aid of equity. In doing so he must act with due diligence and promptness, and equitable relief will not be granted if the effect is either to deprive third parties of rights bona fide acquired or to inflict undue hardship upon the defendant.

(4) In equity a contract into which one party is induced to enter by a material innocent misrepresentation may be rescinded, subject to the limitations set upon this right which in the present state of authority must be taken as unsettled.[56] Where the innocent misrepresentation is antecedent to the contract, that is, where its truth is not made expressly or impliedly a term of the contract, whether a condition or a warranty, the party complaining of it has no right of action for damages at common law.[57]

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[55] This principle, of course, does not apply in the "general offer" cases or where the acceptor cannot reasonably be expected to know that the offer was not addressed to him.

[56] See *supra*, footnote 19. The question is whether the right to rescind for innocent misrepresentation is limited to the case where the contract is wholly executory or where it can be exercised to the extent that equity permits in the case of a fraudulent misrepresentation. Hence prompt action as plaintiff for rescission is even more prudent than in the case of similar proceedings for fraud.

[57] Equity may allow him, in addition to rescission, the limited remedy of indemnity. Both in Judicature Act systems and in New South Wales the party complaining of innocent misrepresentation can set it up by way of defence if sued at common law. If in New South Wales he seeks to rescind, he must, of course, proceed in the equitable jurisdiction.

(5) There may be a term in the contract, whether arising from an innocent or fraudulent misrepresentation, or, independently of any misrepresentation, implied from the conduct of the parties, which, upon the construction of the particular transaction, operates in any one of the ways set out later.

A contract as construed in English law cannot be expressed simply in terms of what each party promises to do, but may consist of a combination of terms—of promises by each party to the other—of the following types:

(a) *Terms about facts believed to be in the control of the parties*

(i) Every executory simple contract necessarily contains a promise by each party that he will do some act or acts.[58] At the time the contract is made such act or acts must be within the limits of possibility, but they need not actually be possible nor, if they are possible at the time the contract is made, is it necessary that performance should continue to be possible.

(ii) There may be a term in the contract, either express or implied, by which both parties agree as to the effect upon their contract of failure by either wholly or partly to perform the acts he promised. No difficulty arises where the parties expressly specify the effect of non-performance by each. More commonly, there is no such express agreement and the parties' defective intention has to be supplemented by the construction of the particular contract and the implication of a term. The question to be determined is whether each party has made performance of his side conditional on performance by the other, and there are three possibilities. (a) The parties may have agreed that one is to perform his part before the other is to perform his promise, and that in the event of non-performance by the former, the latter is to be discharged from performance on his side. (b) The parties may have agreed that each is to perform his part contemporaneously with the other. Each makes his promise to perform conditional upon the other being ready and able to perform at the same time. This is what is meant by saying that in the ordinary contract of sale payment and delivery are concurrent conditions. In situations (a) and (b) the question of construction as to what amounts to total failure to perform, so as to bring into operation the condition which frees the other from performance, often presents difficulty. If the failure to perform is partial, the aggrieved party has a remedy in damages

[58] The term "act" is used not only to include positive acts but forbearances.

but he himself is not thereby excused from performance. (c) The parties may have agreed that each party is to perform his side irrespective of whether the other does or does not perform. In the absence of express stipulation to this effect, modern authorities do not commonly construe a contract in this way.

(b) *Terms about facts not in the control of the parties at all*

Any contract may contain terms, express or implied, which are not within the control of the parties. It is a question of construction in each case whether there are such terms and, if so, what their nature is. The following situations may be distinguished:

(i) One party may make a promise about an external fact not within his control. The actual fact may be determined at the time, but not to the knowledge of the parties, or it may be a fact which has still to occur, and whether it will occur or not is uncertain at the time the contract is made.

(ii) There may be a term in the contract by which both parties agree that the obligation on both sides depends upon the assumption that a state of facts not within their control is as they believed it to be.

(iii) Similarly, according to the construction of the particular contract, there may or may not be a term by which the parties, having contracted on the assumption that a state of facts will remain unchanged or that certain eventualities will not occur, agree that if the state of facts does change or certain eventualities do occur, both parties are to be discharged from further performance.

The effect of non-fulfilment of the terms described in situation (i) depends on the well-settled distinction between conditions and warranties: if the term is a condition, the party complaining of its breach may, if he acts in time, repudiate performance on his side in addition to suing for damages. The terms described in situation (ii) suspend performance on both sides until the fact is determined. If the fact is not as agreed, then both obligations to perform are terminated. The terms described in situation (iii) terminate the obligation to perform on both sides. There is thus only a temporal distinction in the operation of what are sometimes termed suspensive and resolutive conditions. The distinction is ordinarily expressed as being between conditions precedent and conditions subsequent. A condition precedent is a term the effect of which is that one or both parties are not to perform unless such a fact is as it is agreed to be, or again that one or both parties are not to perform unless and until a future and uncertain event happens. A

condition subsequent is a term the effect of which is that one or both parties are to be freed either from performance or from further performance if an agreed state of affairs, at present in existence, does not continue to be so or if an agreed event happens in the future.

In all three situations no difficulty arises where the parties expressly specify what facts are to suspend or terminate the obligation to perform on one side or on both sides. It is otherwise, however, where the parties have been silent and the court is asked to imply a term from the whole behaviour of the parties and the nature of the transaction.

In each situation the first question to be asked is whether such a term can be implied consistently with the expressed intentions of the parties. If, and only if, the answer to this is in the affirmative, then in all three situations a term, whether suspensive or resolutive, and whether its effect is to free one party only or both parties from their obligation, will only be implied where the existence or continuance of the supposed fact or facts is essential to the substantial performance of the contract (that is, put in technical terms, Does non-fulfilment involve a total failure of consideration to one or both parties as the case may be?).[59]

[59] In *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161, Lord Atkin lays down that in the case of an implied condition precedent which frees both parties from their obligation the effect of non-fulfilment must be to make the subject-matter of the contract either non-existent or different in identity as distinct from different in quality, whereas his lordship recognizes that, in the case of a condition, the breach of which entitles the other party to repudiate and sue for damages, it is sufficient that the term is fundamental to the contract in the sense that its non-fulfilment brings about a total failure of consideration. The writer submits that the test is the same with respect to both types of condition and that his lordship took the view he did in a case in which it was desirable to exclude the supposed doctrine of common mistake as making the contract void *ab initio*. His lordship laid down, at pp. 224 *et seq.*, that mistake, to be operative as such, by destroying consent, must go either to the existence or the identity of the subject-matter as distinct from its quality, and he may have been led thereby to the similar conclusion that a term freeing both parties from their contract will only be implied where the subject-matter is non-existent or different in kind from what it is assumed to be.

It is also suggested that the determination of existence or identity in Aristotelian terms is not appropriate to the factual situations with which law is concerned. There is a curious latent anomaly in *Leaf* v. *International Galleries*, [1950] 2 K.B. 86. In that case the learned lords justices, applying Lord Atkin's test, held that the common mistake of the parties as to the picture, although fundamental, did not go to identity so as to bring into operation the supposed rule that common mistake makes the contract a nullity. Two of their lordships, however, were clearly of opinion that the facts raised a condition of the type which, if availed of in time, would have entitled the purchaser to repudiate as well as to claim damages for breach. The anomaly is that, applying Lord Atkin's reasoning, if the mistake had been more fundamental, a condition nullifying the obligation of both parties would have come into existence to deprive the purchaser of his remedy.

A condition of the type which, in addition to freeing one party from performance, entitles him to sue the other party for damages for breach must be distinguished from a warranty,[60] the breach of which merely entitles the party to damages. A term which is a condition at the inception of a contract may sink to the level of a warranty if a party entitled to avail himself of it continues with the contract either through ignorance or choice. Such a condition which has sunk to the level of a warranty is usually termed a warranty *ex post facto*.

A term which discharges one party or both parties from performance is technically called a condition. In English legal terminology, "condition" is a much over-worked term and it has been pushed far beyond its primary use and meaning. It has been extended to deal not only with events which suspend or terminate the performance of a simple express promise but to cover a variety of promises about a variety of matters, including promises about the effect of non-performance by one party or both parties, promises by one party about facts not within his control and common assumptions about facts and events not within the parties' control. The concept in this extended and varied sense has been used in English law to deal with factual situations arising from the common mistake of both parties, situations arising from the unilateral mistake of one party, situations where initial impossibility makes performance by one party impossible, situations where initial impossibility makes performance by both parties impossible, situations where subsequent impossibility makes performance or further performance by one party impossible and situations where subsequent impossibility makes performance or further performance by both parties impossible. But the question is in each case one of the construction of the particular contract. The first question to be asked is whether there is in the particular contract one or more conditions. If the answer is in the affirmative, then the further question arises: What, in the particular contract, is the nature and effect of each condition?

This may be illustrated by considering the following situations which might arise in connection with a contract for the sale of "a tanker lying on Jourmand Reef":

(a) Unknown to the parties, there never has been a tanker on Jourmand Reef. The vendor, in addition to his promise to sell a tanker, may, on the construction of the particular contract, have promised the purchaser that there is a tanker there. In this case

[60] The term "warranty" is here used in its usual sense.

his promise to sell the tanker is not conditional upon a tanker being there and he is liable in damages for breach of the two promises. This was the actual construction put upon the contract in *McRae*'s case.[61] In this case there is also the entirely distinct condition, implied in ordinary contracts of sale, of which the purchaser can take advantage and which, if he discovers the facts in time, discharges him from the obligation of performance by payment, without prejudice to his right of action for damages.

(b) Unknown to the parties, there never has been a tanker on the reef. The vendor, on the construction of the particular contract, may have promised to sell the tanker only if there is one there. On the other hand, the intention of both parties may have been that, whether or not the tanker is there, the purchaser is to pay for his chance of getting one. In this case the vendor is discharged from his obligation, but the purchaser is liable to perform his part and he can neither claim damages for breach nor claim that he has been discharged from performance by breach of a condition amounting to a total failure of consideration. This is the situation recognized in Roman law as *emptio spei.*

(c) Unknown to the parties, there never has been a tanker on the reef. Both the vendor and the purchaser, on the construction of the particular contract, may have agreed that the vendor is to sell if the tanker is there and the purchaser is to pay if the tanker is there. Here, neither party is liable for breach, and both parties are discharged from the contract. This is one of the situations which the Romans would have described as *emptio rei speratae* and which British lawyers (Dixon C.J., Fullagar J. and Denning L.J.) treat as governed by conditions going to the existence of the contract. The writer has preferred to treat such conditions as *terminating* the contract by discharging both parties from performance, on the ground that the former explanation is logically defective in dealing with the problem of anticipatory breach.

(d) Let us suppose that there has originally been a tanker on the reef, but at the time of the contract, unknown to the vendor, it has ceased to exist. This is the case of the *res extincta.* Until *Couturier* v. *Hastie*[62] was critically reviewed, it was believed that such a contract was void, and section 11 of the N. S. W. Sale of Goods Act, 1923-1937[63] (section 6 of the (English) Sale of Goods Act, 1893), which is generally supposed to give legislative recogni-

[61] *McRae* v. *Commonwealth Disposals Commissioner* (1951), 84 C.L.R. 377.

[62] (1856), 5 H.L. Cas. 673; 25 L.J. Ex. 253; 10 E.R. 1065.

[63] 56 & 57 Vict., c. 71, s. 6.

tion to what was believed to be the effect of the decision in *Couturier* v. *Hastie*, provides that such a contract is void. Since *McRae*'s case, however, the position seems to be as follows. (i) In the ordinary case both parties will be discharged from liability, the obligations on both sides being conditional upon the continued existence of the subject-matter. The writer has some difficulty, in spite of section 11 of the Sale of Goods Act, in admitting that such a contract is void *ab initio*. Since by the nature of the case no property can pass to third parties, however, it may be immaterial whether the contract is void *ab initio* for non-fulfilment of the condition or becomes void thereby. *But*, (ii) Since *McRae*'s case it cannot be assumed that the doctrine of the *res extincta* so applies in every contract. Before *McRae*'s case it was assumed[64] that a similar principle applied to the case where the subject-matter never existed. *McRae*'s case has shown conclusively that no such general principle applies and that it is a question of the construction of each contract. Hence in any individual contract it may be possible to argue that the purchaser has expressly or impliedly promised that the subject-matter is still in existence or, conversely, (although less likely and more difficult to prove) that the purchaser has promised to take a chance and pay even if the subject-matter has perished.

(e) The tanker may have been on the reef at the time the contract was made, but, before the purchaser has realized the full benefits of his bargain, has subsequently ceased to exist. Here three questions arise: (i) can the purchaser sue the vendor for damages for breach of contract or, if he has already paid, recover back the purchase price? (ii) can the vendor sue the purchaser for the full price if it has not been paid or, if it has been paid, successfully resist an action for the recovery of the purchase price? (iii) are both parties discharged from liability, the purchaser from his promise to pay and the vendor from his promise to sell the tanker?

The answer depends upon the nature of the term to be implied from the construction of the particular contract. (a) Is there an implied condition that, if the subject-matter ceases to exist, the vendor is to be freed from his obligation or, alternatively, has he promised without reservation to deliver the goods? (b) Is there an implied condition in the contract that, if the subject-matter ceases to exist, the purchaser is to be freed from liability or, alternatively, is he to remain liable for the purchase price? (c) Is there an implied condition in the contract freeing both parties from their

[64] See Cheshire & Fifoot, Law of Contract (3rd ed.) pp. 176 *et seq.*

obligation? In other words, is there any condition at all in the contract and, if there is, what is its nature? Does it relieve the vendor and not the purchaser, or the purchaser and not the vendor, or does it relieve both? In the ordinary case, when the subject-matter has ceased to exist, a condition freeing both parties from their obligation is implied. This is the doctrine of discharge by frustration or subsequent impossibility of performance.

From what has been said, however, it will appear that all such conditions operate by freeing one or both parties from the liability to perform. Some authorities, judicial and academic, appear to recognize a type of condition which goes to the existence of the contract in the sense that it prevents a contract from coming into existence or suspends the whole of the contractual obligation.[65]

It is submitted that this is not correct in theory for the reason that a condition cannot have a contractual operation without existing as a term in a binding contract. The difficulty only arises in the situation where both parties make a common basic assump-

[65] See Dixon J. (as he then was) and Fullagar J. in *McRae*'s case, at p. 409, where they say, "it is not a case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations". The views of Lord Atkin in *Bell* v. *Lever Bros. Ltd.* and of Denning L.J. in *Solle* v. *Butcher* on this point cannot be gathered with certainty. The writer, however, construes the words of Denning L.J. as supporting the argument he advances in the article. Lord Atkin says, [1932] A.C. 161, at pp. 224 *et seq.*: "The question of the existence of conditions, express or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made. A condition derives its efficacy from the consent of the parties, express or implied. They have agreed, but on what terms. One term may be that unless the facts are or are not of a particular nature, or unless an event has or has not happened, the contract is not to take effect. With regard to future facts such a condition is obviously contractual. Till the event occurs the parties are bound. Thus the condition (the exact terms of which need not here be investigated) that is generally accepted as underlying the principle of the frustration cases is contractual, an implied condition. Sir John Simon formulated for the assistance of your lordships a proposition which should be recorded: 'Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void *ab initio* if the assumption is of present fact and it ceases to bind if the assumption is of future fact.'

"I think few would demur to this statement but its value depends upon the meaning of 'a contractual assumption', and also upon the true meaning to be attached to 'basis', a metaphor which may mislead."

With respect, his lordship appears to draw a distinction between conditions as to future facts and conditions as to present facts which is unnecessary and cannot be sustained. It may be that his lordship was preoccupied, as he was bound to be, with assimilating the law relating to conditions with the supposed rule that common mistake nullifies consent and also with excluding the application of either principle to the facts in *Bell* v. *Lever Bros. Ltd.*

tion essential to performance on both sides. It seems truer, however, to say that in such a case a contract comes into existence but both parties are discharged from obligation under it by nonfulfilment of a condition precedent before they have begun to perform. The point is not without practical importance, as the theory advocated by the writer allows for the operation of the doctrine of anticipatory breach, whereas the other theory would exclude it.

This article is concerned only with the operation of conditions precedent, and for its purpose it is necessary to emphasize the distinction between (i) conditions the breach of which entitle one party to say that he is discharged from performance, and (ii) conditions the breach of which entitle both parties to say that they are discharged from performance. The distinction between the two types of condition is of fundamental importance for the purpose of the particular inquiry, because in the first case the party availing himself of the condition may, in addition to repudiating the contract, sue the other party for damages for breach, whereas in the second case both parties are discharged from their contractual obligations and neither party has a remedy against the other.[66]

## IV. *The Effect, If Any, of Mistake As Such upon a Contract*

The inquiry will be approached by distinguishing the cases in which mistake, *as such*, either has or has been supposed to have an operative effect and by examining those cases in light of the other principles, discussed already, which may operate to free one or both parties from an alleged contract.[67]

### (a) *The effect of common mistake at common law*

Here the situation is that there is true agreement between the parties. Both parties, outwardly and inwardly, are genuinely agreed as to the nature of their contract and its terms, but their agreement rests on a misapprehension shared by both parties. In this situation it is obviously fictitious as a matter of legal theory

[66] It may be, and indeed usually happens, that one party seeks to hold the other party to the contract in such cases, in which case the latter may find it advisable to seek the aid of equity.

[67] It is not only convenient, but important, to distinguish these cases. When the theory of operative mistake reached its highest recognition, great difficulty was occasioned both in the texts and in the authorities by attempts to bring the situations in which mistake was supposed to operate under unified principles. It is equally important in dealing with the eclipse of the theory to guard against over-estimating its extent. The analysis which follows is found in most modern textbooks. Having regard to the emphasis by Denning L.J. on the existence of equitable remedies for mistake, each situation will be treated in light of (a) any common-law rules applicable, and (b) any equitable principles applicable.

to base the supposed rule that the agreement in such a case is void at common law on the principle of absence of consent between the parties. More important, the cases of *McRae* v. *Commonwealth Disposals Commission*[68] and *Rose* v. *Pim*[69] demonstrate that the supposed rule produces absurd results if accepted as of general application. Hence, both theoretically and practically, the existence of any such rule is open to question. It is the writer's submission that the effect of recent English and Australian decisions is to eliminate from the common law the supposed rule that common mistake makes a contract void. The current of authority appears to be as follows.

Before the decision in *Bell* v. *Lever Bros. Ltd.*[70] there was a general belief that common mistake as to a fundamental fact at the root of the contract made the contract void at common law by destroying consent. It is difficult, however, to find decisions which authoritatively support any such principle and the explanation of its currency may be in a misunderstanding of the judgments in the Exchequer Chamber in *Couturier* v. *Hastie*,[71] taken in conjunction with the citation from Pothier in that case.

In *Bell* v. *Lever Bros. Ltd.* Lord Atkin advances two distinct theories on the effect of common mistake as making a contract void at common law. (i) Drawing no distinction between common mistake and unilateral mistake, his lordship lays down that mistake operates, if at all, to nullify consent. He then goes on to say that common mistake will only nullify consent if it goes to the *existence* of the subject-matter, as distinct from a mistake as to its *quality*. (ii) The second and theoretically distinct principle advanced by his lordship is that common mistake operates to make the contract void if the truth of the common assumption by the parties can be implied into the contract as a condition precedent to their obligation. This can be accepted as unquestionable if his lordship is using the term "void" to denote that the contractual obligations of both parties are *terminated* by the non-fulfilment of the condition, as opposed to the use of the term to denote an agreement which is a legal nullity *ab initio*. On this point, however, his lordship's language is not free from ambiguity. He then goes on to say that such a term can only be implied where the common mistake goes to the *existence* of the subject-matter. In each of his alternative theories, therefore, his lordship uses the same test,

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[68] (1951), 84 C.L.R. 377.
[69] [1953] 2 Q.B. 450.
[70] [1932] A.C. 161.
[71] (1856), 5 H.L. Cas. 673; 25 L.J. Ex. 253; 10 E.R. 1065.

namely, mistake as to existence of the subject-matter as distinguished from a mistake as to its quality, to determine whether the mistake has any contractual effect. It may be questioned whether this test is not, like the Aristotelian logic of species, fallible and unsatisfactory in any practical application in the field of law.[72]

The next stage in the clarification of the modern law is the case of *Solle* v. *Butcher*.[73] The actual decision amounts simply to an exclusion of the supposed principle that common mistake makes the contract void at common law from the particular facts by a finding that the mistake, although fundamental, did not go to the existence of the subject-matter, and the plaintiff was granted relief on equitable grounds. The case, however, is important for the dicta of Denning L.J. His lordship, in a learned judgment, (i) rejects the doctrine that common mistake can operate *as such* to make a contract void at law *ab initio*, (ii) interprets *Bell* v. *Lever Bros. Ltd.*[74] in light of the second theory propounded by Lord Atkin and just set out, and (iii) uses language which supports the argument of the writer that, even where a condition precedent freeing both parties from their obligation can be implied from the common assumption of the parties, the contract in such a case is not void ab initio, but becomes void by the non-fulfilment of the condition.

The important Australian case of *McRae* v. *Commonwealth Disposals Commissioner*[75] is authority for the following propositions. (i) Common mistake, even where it goes to the *existence* of the subject-matter, does not operate to make the contract void at law ab initio *by destroying consent*.[76] (ii) The decision in *Couturier*

[72] Such a test also introduces an unfortunate distinction, of which his lordship appears to be conscious, between an implied condition which entitles *one* party to repudiate the contract and sue for breach. The acceptance of such a distinction requires for the former type of condition a mistake as to existence or essential nature, while, for the latter type of condition, a mistake as to quality suffices, provided it is sufficiently fundamental. The application of such a distinction leads in practice to absurd and unacceptable results. The demonstration of this is latent in *Leaf* v. *International Galleries*, [1950] 2 K.B. 86, and patent in *McRae* v. *Commonwealth Disposals Commission* (1951), 84 C.L.R. 377.

It is submitted that both Lord Atkin's reasoning in *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161, and Denning L.J.'s reasoning in *Leaf* v. *International Galleries* is affected by their lordships' appreciation of the harsh results which would flow from the application of the supposed general principle.

[73] [1950] 1 K.B. 671.

[74] [1932] A.C. 161.

[75] (1951), 84 C.L.R. 377.

[76] Their Honours, no doubt out of respect for previous supposed authority, base their decision also on the ground that, even if such a mistake does make the contract void, a party who by his negligence has induced the common mistake is estopped from proving it. The very learned joint judgment of Dixon J. (as he then was) and Fullagar J., however,

v. *Hastie*[77] is no authority for the proposition that a common mistake by both parties as to the existence of the subject-matter makes the contract void ab initio. It is a question of the construction of the particular contract whether a condition can be implied into the contract and, if so, the further question of construction arises as to what type of condition can be implied. Even where the subject-matter is non-existent, a condition precedent freeing *both* parties from their obligations is not necessarily implied in the contract, but, on the contrary, on the construction of the particular contract there may be a condition in the nature of an undertaking by *one* party that the subject-matter exists, and for the breach of this undertaking he will be liable in damages. (iii) Section 6 of the English Sale of Goods Act, 1893, and section 11 of the New South Wales Sale of Goods Act, 1923-1937, whatever their application may be, have no application to the facts in *McRae*'s case.

In light of *McRae*'s case Cheshire and Fifoot's account of the doctrine of the *res extincta* and the decision in *Couturier* v. *Hastie*[78] cannot be accepted for two reasons. (1) The case shows that it is a question of construction in each contract whether any term can be implied as to the existence of the subject-matter and, if so, what the nature of the term so implied is. (2) Sections 6 and 11 of the respective acts deal with goods which have perished at the time the contract is made and *McRae*'s case shows that they do not necessarily apply to goods *which have never been in existence.* The precise effect of these sections cannot be regarded as clear. Much depends on the construction the courts may give to the word "void". It is suggested that they cannot apply where in a particular contract there is either a clear implication by the vendor that the goods are still in existence or a clear promise, express or implied, by the purchaser that he will pay for the goods whether they are in existence or not.

The decisions in *Leaf* v. *International Galleries*[79] and *Rose* v. *Pim*[80] reinforce the point taken that not only may there be no implied condition precedent that the subject-matter is in existence, the non-fulfilment of which would free both parties from liability, but, on the contrary, there may be, in the particular contract, an implied condition in the shape of an undertaking by *one party*

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rests primarily on the proposition enunciated in the text, and common sense and justice would not have it otherwise.

[77] (1856), 5 H.L. Cas. 673; 25 L.J. Ex. 253; 10 E.R. 1065.

[78] Cheshire & Fifoot, Law of Contract (3rd ed.) pp. 176-177.

[79] [1950] 2 K.B. 86.

[80] [1953] 2 Q.B. 450.

(going either to existence or quality) which gives the *other party* a right to repudiate if he acts in time and, in any case, a right of action for damages.

(b) *The effect of common mistake in equity*

In dealing with the effect of common mistake in equity it is essential to remember that a court of equity always has a general discretion to refuse equitable remedies and that this can be exercised even where the contract is both good at common law and unimpeachable upon any grounds in equity.

The important question which arises in the context of common mistake is whether equity will rescind a contract for common mistake as such, independently of granting relief for fraud or innocent misrepresentation or assisting a party to repudiate a contract for breach of a condition. Some light on this question is to be found in the important judgment of Denning L.J. in *Solle* v. *Butcher*.[81] His lordship was of opinion that equity will grant rescission of a contract for a mistake not necessarily entitling a party to any relief either at common law or upon the recognized equitable grounds of innocent misrepresentation or equitable fraud. In that case he says[82] that "a contract is also liable in Equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault".

The second branch of his lordship's proposition, with respect to a mistake by the parties "as to their relative and respective rights", appears, with respect, a felicitous way of expressing (or perhaps finding) the principle underlying the decisions in *Bingham* v. *Bingham*[83] and *Cooper* v. *Phibbs*.[84] His lordship's formulation also has the great merit of eliminating from the principle he enunciates any reference to the supposed distinction between mistake of law and mistake of fact.

With regard to the first branch of his lordship's proposition, that equity will relieve on the ground of "a common misapprehension as to facts", it is submitted that it is difficult to conceive of any circumstances in which equity could properly give relief by way of rescission, unless the misapprehension arises through the misrepresentation or fraud of a party or in such circumstances

[81] [1950] 1 K.B. 671, at pp. 692-693. [82] At p. 693.
[83] (1748), 1 Ves. Sen. 126; 27 E.R. 934.
[84] (1867), L.R. 2 H.L. 149; *16* L.T. *678*; *15* W.R. 1049; 22 Digest 162, *1377*.

that it can be incorporated into the contract as a condition, either freeing both parties from liability or entitling one party to repudiate for breach. The decision in *British Movietone News* v. *London Cinemas*[85] affords some authority in support of this view, although a principle applicable to discharge by frustration is not necessarily applicable to the type of situation under discussion. The considerations of policy expressed in the maxims *pacta sunt servanda* and *caveat emptor* would also seem to require the limitation of any general equitable jurisdiction to relieve on the ground of mistake *simpliciter*, but the precise limits of such relief is a question which must be left in the lap of future litigants.

(c) *Where offer and acceptance do not correspond in terms and one party is aware of the lack of correspondence*

The situation where one party is aware of the lack of correspondence between offer and acceptance is covered by the decision in *Smith* v. *Hughes*,[86] whatever the principles are which the case establishes. Modern textbooks describe the factual situation as a unilateral mistake by one party as to the nature of the offer, which is known to the other. The writer prefers to describe it in the terms he has used to allow for the fact that conversely the mistake may be in the mind of the offeror and known to the acceptor.

According to the textbooks and some academic writers the alleged contract in such a case is a nullity and void *ab initio* at common law, because offer and acceptance do not correspond in terms, and the party who knows of the mistake cannot avail himself of the docrine of estoppel. In *Solle* v. *Butcher* Denning L.J.[87] treats *Smith* v. *Hughes* as an illustration of the common law's excessive use before the Judicature Act of the doctrine that mistake as such makes a contract void, and his lordship expresses the opinion that at the present day such a contract would be good at law but voidable in equity.

It is submitted that neither view is correct. In such cases the contract is good *ab initio* and the victim of the mistake has a remedy in damages, either on the ground that the party who knows of the mistake is estopped from proving that the terms are not as the other party believes them to be or on the ground that he warrants the facts to be as the other party believes them to be. It is suggested that the latter explanation is the correct one and that, if the mistake is fundamental, the victim may, in addition to suing

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[85] [1952] A.C. 166.
[86] (1871), L.R. 6 Q.B. 597.
[87] [1950] 1 K.B. 671, at pp. 692-693.

for damages, repudiate the contract for breach of a condition, provided that he acts in time. It is suggested that in *Smith* v. *Hughes* the contract was not void, but, on the contrary, although the defendant in the particular case was content merely to resist the claim for payment, there was a valid binding contract which he was entitled to repudiate for breach of a condition and that, apart from repudiation, he was entitled to damages for breach. If, however, the mistake is not embodied in the terms of the contract and is in no way induced by the other party, the maxim *caveat emptor* applies and the victim of the mistake is not entitled to relief at law or in equity.

(d) *Unilateral mistake as to the nature of a written instrument*

As authority stands, the *non est factum* group of cases must be accepted as a well established category in which mistake, *as such*, operates to make the contract void *ab initio*. The extension of the old defence of *non est factum* to written instruments generally in the 19th century has had unfortunate results in establishing a distinction between a mistake as to the nature of the instrument as opposed to a mistake as to its terms. The rule that such a mistake makes the contract void and that a party can plead the defence irrespective of his negligence, except in the case of negotiable instruments, leads to most unfortunate consequences to innocent third parties. However, until the House of Lords reviews the situation, the authorities are too clear to warrant further discussion.

(e) *Mutual mistake*[88] *where offer and acceptance do not correspond in terms and neither party is estopped from proving this*

This situation is exemplified by such cases as *Raffles* v. *Wichelhaus*,[89] *Scriven* v. *Hindley*,[90] *Falck* v. *Williams*[91] and *Henkel* v. *Pape*.[92] Where *A* offers one thing and *B*, believing the offer to be of something different, makes what one of them alleges is a binding acceptance, each party is bound by the contruction a reasonable man would put upon his words and conduct. But where the behaviour of both parties is genuinely ambiguous there is no contract because there is neither inward agreement nor the outward semblance of a bargain. What one party alleges to be a con-

[88] The term "mutual mistake" is used in the sense in which it is used in recent cases and by modern writers. In *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161, the term is used in the sense in which the phrase "common mistake" is used in this article.

[89] (1864), 2 H. & C. 906.

[90] [1913] 3 K.B. 564.

[91] [1900] A.C. 176.

[92] (1870), L.R. 6 Ex. 7.

tract has never had any existence because the requirements, both outward and inward, of offer and acceptance have not been met and the terms of the alleged agreement have not been defined with sufficient precision for the law to attach legal effect to them. In equity the position is the same, and equity can lend no aid to deal with a nullity.

Where the lack of correspondence in terms is trivial and the substance of the agreement is certain and definite, a court of equity may in its discretion refuse specific performance, leaving the party to his remedy at law.

(f) *Unilateral mistake as to the identity of a party to the contract*

The cases involving a mistake as to the identity of a party fall into six well-known groups, exemplified by the following cases: (i) *Boulton* v. *Jones*,[93] (ii) *Cundy* v. *Lindsay*,[94] (iii) *King's Norton Metal Co.* v. *Edridge*,[95] (iv) *Phillips* v. *Brooks*,[96] (v) *Hardman* v. *Booth*,[97] and (vi) *Sowler* v. *Potter*.[98] The question whether the contract is a nullity in such cases is of fundamental practical importance where innocent third parties have acquired rights.

It is submitted that the following principles governing offer and acceptance can properly be deduced from the British authorities. (i) An offer may be made to the world at large, or it may be intended only for a specific and defined person. (ii) As English law is giving legal effect to bargains,[99] an offer intended for a specific person can only be accepted by that person, unless any other person would assume as a reasonable man that the offer was addressed to him. *But* (iii) a person cannot make himself a party to a legal bargain with another party who he knows has no intention of dealing with him, whether as an offeror or as an acceptor. In this case, however, policy may suggest that, where an innocent third party is exposed to loss, it should be thrown upon the person whose conduct first put into train the events which led to it.

In view, however, of some passages in the judgment of Denning L.J. in *Solle* v. *Butcher*, some comment will be made upon these principles in their application to the situations exemplified by the six cases just listed.

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[93] (1857), 2 H. & N. 564; 157 E.R. 232.
[94] (1876), 1 Q.B.D. 348; (1878), 3 App. Cas. 459.
[95] (1897), 14 T.L.R. 98. [96] [1919] 2 K.B. 243.
[97] (1863), 1 H. & C. 803; 158 E.R. 1107.
[98] [1940] 1 K.B. 271.
[99] The rules as to offer and acceptance in the English law of simple contract depend not on *a priori* analysis of agreement as a state of mind, but are practical rules for the construction of a bargain.

*Boulton* v. *Jones*[100] is a decision obviously correct in principle and, so far as the writer knows, it has never been questioned.

It is submitted that *Cundy* v. *Lindsay*[101] is correctly decided on principle and that it does not involve the "subjective" theory of contract which it is commonly supposed to illustrate. There was no bargain and no agreement, outward or inward, between the parties, and the only real question raised by the facts was whether, *as a matter of policy*, the court should not have affixed a contractual relation to the parties' dealings, irrespective of their intentions, as the courts have done in certain other exceptional cases on grounds of policy and convenience. Notable examples of this exceptional type of case in which there is no outward structure of bargain are to be found in the rules governing contracts concluded through the post and the "ticket" cases.

Denning L.J., however, treats *Cundy* v. *Lindsay* as another illustration of the tendency of common-law courts to push the doctrine of mistake beyond its proper limits at the expense of innocent third parties.[102] His lordship suggests[103] that "since the fusion of law and equity there is no reason to continue this process, and it will be found that only those contracts are now held void in which the mistake was such as to prevent the formation of any contract at all". His lordship then continues:[104]

> Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance* v. *Bolton*,[105] per James L.J.
>
> The court had, of course, to define what it considered to be unconscientious, but in this respect equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of one party has been induced by a material misrepresentation of the

[100] (1857), 2 H. & N. 564; 157 E.R. 232.

[101] (1876), 1 Q.B.D. 348; (1878), 3 App. Cas. 459.

[102] See *Solle* v. *Butcher*, [1950] 1 K.B. 671, at pp. 691-693. An alternative solution to the problem of mistake as to the identity of a party would be to treat the acceptance of an offer made to a specific person as importing into the contract a condition that both the identity and personality of the party are in accordance with the intention of the offeror. This would appear to accord with the views of Denning L.J. at pp. 692-693, although his lordship's words are addressed specifically to the question of equitable relief in such cases. Such a theory would put the *Cundy* v. *Lindsay* situation on the same footing as the *Sowler* v. *Potter* situation. This solution is not open to the courts at the present day in the light of the decision in *Cundy* v. *Lindsay*.

[103] [1950] 1 K.B. 671, at p. 691.

[104] *Ibid.*, at pp. 692-693.

[105] (1872), L.R. 8 Ch. 118, at p. 124.

other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake. That is, I venture to think, the ground on which the defendant in *Smith* v. *Hughes*[106] would be exempted nowadays, and on which, according to the view by Blackburn J. of the facts, the contract in *Lindsay* v. *Cundy*[107] was voidable and not void; and on which the lease in *Sowler* v. *Potter*[108] was, in my opinion, voidable and not void.

It is submitted that, if the jurisdiction to relieve on broad equitable grounds is pushed too far, it may be at the expense of justice and public policy as expressed in the maxim *pacta sunt servanda*. Assuming that the decision in *Cundy* v. *Lindsay* stands, and that the common-law principles set out are sound, all that justice seems to require in the case of a mistake, whether as to the identity or as to the personal qualities of a party to a contract, is that equity should give relief if the mistake is induced by fraud or innocent misrepresentation, or where a term as to identity or personal qualities can be implied into the contract. It is at least debatable whether equitable relief by way of rescission should be given where there is no misrepresentation and no such implied term. In such cases there seems no reason why a person should lose his contractual rights because he knows that the other party is under a delusion, although this may well be a ground for *refusing* equitable remedies and leaving him to his remedy at law.

There is weight in his lordship's argument that the common-law rules impose hardship upon innocent third parties, but, as an analysis of bargain and agreement, they are unexceptionable and the writer is not convinced that the supposed policy which assigns loss in the case of innocent parties should extend to impose the legal consequences of bargain upon a person who has no intention of dealing with a fraudulent stranger. Be this as it may, it is submitted that *Cundy* v. *Lindsay*[109] has stood too long to be questioned, and that in any case both established equitable principle and the requirements of policy demand that the right to rescind in equity should be confined to cases where a party can repudiate at law or on the recognized equitable grounds of innocent misrepresentation and equitable fraud.

Similarly the decision in *King's Norton Metal Co.* v. *Edridge*,[110]

[106] (1871), L.R. 6 Q.B. 597. [107] (1876), 1 Q.B.D. 348, at p. 355.
[108] [1940] 1 K.B. 271.
[109] (1876), 1 Q.B.D. 348; (1878), 3 App. Cas. 459.
[110] (1897), 14 T.L.R. 98.

and with that decision a distinction between that case and *Cundy* v. *Lindsay*,[111] stand on the ground that in the latter case there was a bargain between the actual parties to the alleged contract, while in the former case there was not. Admittedly the decision in *King's Norton Metal Co.* v. *Edridge* leads to results with respect to third party rights consonant with public policy, but it is the writer's submission that the distinction between the two cases is sound and that the latter should not necessarily be interpreted as an attempt to limit the scope of a prior unfortunate binding authority.

It is submitted that the decision in *Hardman* v. *Booth*[112] is similarly a correct application of the principle set out and *Phillips* v. *Brooks*,[113] if it stands at all, must be interpreted as a decision on the particular facts, turning on the distinction established by *Cundy* v. *Lindsay* and *King's Norton Metal Co.* v. *Edridge*, and not on the supposed distinction between transactions between parties physically in each other's company and transactions not so concluded.[114]

*Sowler* v. *Potter* is generally accepted as bad law.[115] On principle such a contract is not void *ab initio* for mistake, but can be rescinded for fraud or misrepresentation, or if a term as to the truth of the facts assumed can be implied into the contract. It is the writer's submission that, beyond this, there is no general equitable jurisdiction to grant relief on the ground of mistake *simpliciter*.

## V. *Conclusions*

(1) English law does not recognize any general doctrine of mistake, *operating as such*, to render the contract a nullity by destroying consent. There is, as authority stands, one exceptional group of cases, namely, mistake as to the nature of a written instrument, to which the doctrine applies.

(2) At common law common mistake does not make a contract void *ab initio*, but a party may be entitled at law to repudiate the contract for fraud or because, on the construction of the particular contract, there is either an implied condition which, if unfulfilled, frees both parties from their obligations to perform or

[111] Cheshire & Fifoot, *op. cit.*, pp. 199 *et seq.* In *Cundy* v. *Lindsay*, *supra*, footnote 109, there was a party in existence with whom the plaintiffs thought they were dealing.

[112] (1863), 1 H. & C. 803; 158 E.R. 1107.

[113] [1919] 2 K.B. 243.

[114] Cheshire & Fifoot, *op. cit.*, pp. 200-201.

[115] *Supra*, footnote 114, pp. 201-202. See Denning L.J. in *Solle* v. *Butcher*, [1950] 1 K.B. 671, at p. 693.

there is an implied condition which entitles him to repudiate for breach. In equity there is jurisdiction to rescind a contract (a) on any grounds entitling a party to rescind at common law; (b) on the grounds of equitable fraud or innocent misrepresentation, and (c) where the parties are under a common mistake as to their respective rights, provided the mistake is not induced by the fault of the party seeking to rescind. In addition there may be an equitable jurisdiction of undefined extent to rescind on the ground of common mistake on fair and just terms, provided the mistake is not induced by the fault of the party claiming relief.

(3) Where offer and acceptance do not correspond in terms and one party is aware of the lack of correspondence (*Smith* v. *Hughes*[116]), the contract is not void ab initio, but on the contrary such a party is estopped from proving his mistake. If the mistake is fundamental, the other party, in addition to his remedy in damages for breach, may repudiate the contract, provided that he acts in time. If, however, the mistake is not embodied in the terms of the contract, the party suffering thereby has no grounds for relief at law or in equity.

(4) Until the House of Lords decides otherwise, mistake *as such* must be accepted in England and (probably) in Australia as operating to make the contract void *ab initio* in the group of cases in which the defence of *non est factum* is available.

(5) Mistake may prevent the formation of a contract because the requirements of agreement, outward and inward, as expressed in terms of offer and acceptance are not satisfied. This occurs in two types of case: (a) where offer and acceptance do not correspond in terms and neither party is aware of the other's mistake and, because the situation is genuinely ambiguous, neither party is estopped from proving his true intention; (b) where a party, whether as offeror or as acceptor, intends only to contract with another specific party and some other party, who is aware of this specific intent, seeks, whether as acceptor or offeror, to impose contractual liability upon him.

[116] (1871), L.R. 6 Q.B. 597.